SUBJECT INDEX

		Page
I.	REFERENCE TO REPORTS OF OPINIONS	1
II.	STATEMENT OF GROUNDS TO INVOKE JURISDICTION	1
III.	QUESTIONS PRESENTED	2
IV.	STATEMENT OF CASE	3
V.	PRESENTATION OF FEDERAL QUESTION	7
VI.	ALTERNATE REASONS FOR REVIEW BY CERTIORARI	13
VII.	ORDER APPEALED FROM	15
VIII.	CONCLUSION	15
IX.	PROOF OF SERVICE	16

TABLE OF AUTHORITIES

Page

I. CONSTITUTIONS AND STATUTES

Constitution of United States of America, Amendment XIV, Section 1. 2

Constitution of Virginia, Section 8 14

Constitution of Virginia, Section 60 7

United States Code, Title 28, Section 1257(2) 2

Virginia Acts 1958, ch. 377 8

Virginia Acts 1960, ch. 358 8

Va. Code of 1877, ch. 194 §13 8

Va. Code of 1887 §3826 8

Va. Code of 1919 §4693 8

Va. Code of 1950 §18-301 8

Va. Code of 1950 §18.1 - 340 ..... 2, 5, 8, 10

II. JUDICIAL DECISIONS

Giaccio v. *Pennsylvania*, 382 U. S. 399, 86 S. Ct. 518, 15 L. 2d 447 (1966) 2, 13

Hayden v. *Commonwealth*, 203 Va. 398, 124 S. E. 2d 13 (1962) 9

TABLE OF AUTHORITIES (Continued)

Page

Jencks v. *United States*, 353 U. S. 657, 77 S. Ct. 1007, 1 L. 2d 1103 (1957) 14

Map v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684 6 L. 2d 1081 (1961) 14

Maughs v. *Porter*, 157 Va. 415, 161 S. E. 41 (1931) 9

Pointer v. *Texas*, 380—U. S. 400, 85 S. Ct. 1065 13 L. 2d 923 (1965) 14

Thompson v. *Louisville*, 362 U. S. 199, 80 S. Ct. 624, 4 L. 2d 654, 80 A. L. R. 2d 1355 (1960) .. 13

III. TREATISE

Note: Contests of Skill and the Lottery Laws, 23 Va. Law Rev. 431 9

IN THE

Supreme Court of the United States

OLIVER W. ARNOLD,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
Appellee

JURISDICTIONAL STATEMENT

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The Appellant, Oliver W. Arnold, submits the following statement of the jurisdiction for this appeal.

I. REFERENCE TO REPORTS OF OPINIONS

A writ of error was denied by the Supreme Court of Appeals of Virginia to the judgment of conviction of the trial court; and consequently no opinion was rendered or reported in an official or unofficial report.

II. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

Jurisdiction is invoked on the grounds that the Appellant was convicted by a State court of the crime of violating a State criminal statute which is invalid

because the statute is repugnant to Section 1 of the Amendment XIV of the Constitution of the United State of America; and

1. The nature of the proceeding sought to be reviewed is a prosecution by the Appellee against the Appellant for the felonious operation of a numbers racket as defined by the Va. Code §18.1-340; and

2. The judgment sought to be reviewed was made and entered by the Supreme Court of Appeals of Virginia on October 5, 1966, and the notice of appeal to this Court was timely filed with that court on January 3, 1967 within the required ninety days; and

3. The statutory provision believed to confer the jurisdiction on this Court is 28 U. S. C. §1257 (2); and

4. One of the numerous judicial decisions by this Court believed to sustain jurisdiction is: *Giaccio* v. *Pennsylvania,* 382 U. S. 399, 86 S. Ct. 518, 15 L. 2d 447 (1966); and

5. The validity of Section 340 of Title 18.1 of the Code of Virginia of 1950 as amended is involved; said statute is found in the 1960 Replacement Volume 4 of the Code of Virginia of 1950 on pages 303-304; and the text of said statute is set out verbatim on pages 7 and 8 of this jurisdictional statement.

III. QUESTIONS PRESENTED

The questions presented by this appeal are:

(a) Is the statute making a felony of the operation of a numbers racket invalid because it is vague and standardless?

(b) Was Instruction No. 1 given on behalf of the Commonwealth erroneous because it was so general and indefinite in its terms as to involve the submission of a matter of law to the jury for determination?

(c) Should the verdict of the jury have been set aside because it was uncertain what the jury decided?

(d) Should a new trial be granted for improper remarks made by the Commonwealth's Attorney in his opening statement?

(e) Should the testimony of C. H. Moore, particularly in regard to his opinion designating two slips of paper as numbers slips, have been stricken from the record?

(f) Is a police officer subject to cross-examination from his report of the investigation of the crime?

(g) Was the evidence sufficient to convict?

(h) Did certain remarks made by the trial judge in the presence of the jury result in prejudicial error?

IV. STATEMENT OF CASE

The following is a concise statement of the case confined to the question of jurisdiction. Page references to the record prepared by the clerk of the trial court are preceded by the letter "R" and to the transcript are preceded by the letter "T".

On August 11, 1965, at approximately 11:30 A. M. (T. 97) several investigators for the Virginia Alcoholic Beverage Control Board and other law officers (T. 47) searched a building at 301 First Street, Northwest, Roanoke, Virginia, called Jackie's Shoe Shine

Parlor, for violations of the Virginia A. B. C. Act (T. 54). A shoe shine parlor is operated in front (T. 48) but the back room is apparently used for a common nuisance commonly called a "nip joint" (T. 56-57) allegedly operated by the Cabbler brothers (T. 57). At the time of this raid, the place was being operated by Hal Cabbler, the father of the alleged operators. (T. 57-58).

Appellant was standing in the front room leaning on a counter at the time of the raid. (T. 100) and, because he was the first person encountered, one of the investigators handed the search warrant to him (T. 61; T. 100-102). Because the warrant was for the place and not him individually, Appellant refused to be searched (T. 102) after handing the investigator the items in his hand (T. 102). Since he was charged with no crime, the Appellant tried to leave but this was not permitted (T. 102-103; T. 210). Later Investigator Bell saw Appellant secretly throw on the floor two slips of paper (T. 52) introduced as Commonwealth's Exhibits 1 and 2 (T. 53). Appellant denied throwing the slips on the floor and an argument resulted. At this moment, Roanoke City Vice Squad Officer H. J. Heath entered the premises and arrested Appellant for disorderly conduct (T. 69) and upon seeing the slips of paper also charged Appellant with possession of numbers slips (T. 70).

Both of these charges were for violations of ordinances of the City of Roanoke, Virginia. No warrants were obtained for either of these two violations, but on September 1965, Appellant was tried in the Municipal Court of the City of Roanoke for the charges. At the conclusion of the trial, Appellant was bound over to the grand jury for felonious violation of Va. Code

§18.1 - 340 although neither Appellant nor his counsel was aware that the trial was a preliminary hearing for a felony.

Subsequently Appellant was indicted by a special grand jury impaneled by the Hustings Court of the City of Roanoke for the apparent felony that he "did unlawfully and feloniously promote and be concerned in the managing and drawing of a lottery for money and other things of value, said lottery being commonly known as the numbers game" (R. 2). After several continuances and pretrial conferences, the charge was tried by a petit jury impaneled by said Hustings Court on January 13, 1965 (R. 17-19).

At the trial, a mass of ordinary newspapers gathered from the premises was introduced in evidence. These newspapers contained appropriate news items reporting stock market prices and horse racing results. A witness, Floyd M. Bailey, testified that he played the number "906" for 25c with Appellant in front of Wheeby's Store on First Street, Northwest, Roanoke, Virginia on August 5, 1965 (T. 90-91). Another witness, Samuel Grant Fleming, testified he played numbers with Appellant "Two or three times" approximately a "year or more" before the raid on August 11, 1965 (T. 116). The investigators identified the two ordinary slips of paper which Appellant allegedly threw on the floor (T. 53).

Then an expert witness testified how a numbers game is operated. He also testified that two separate numbers games were operated in Roanoke, Virginia. One of the games based the winnings on the stock market results and the other game based the winnings

on horse racing results (T. 125-134). He stated Jackie's Shoe Shine Parlor gave information by telephone about current winning numbers (T. 134).

In particular the expert testified there were two major numbers games in the City of Roanoke. In each game, the "player" gambled on the number with a "writer" who passed the bet on to a "banker" who headed the operation. Each "writer" took bets from several "players"; each "runner" took bets from several "writers", and the "banker" took bets from several "runners." In a small operation, a person could be a "writer", "runner", and "banker" or a combination of two of them; but in Roanoke there were two major numbers games. This testimony was hypothetical, without mentioning the Appellant, to explain to the judge and jury the nature of the alleged crime with which the Appellant was charged (T. 127-134).

Throughout every stage of the trial, in the notice of appeal and assignments of error to the rulings of the trial court (R. 26-28); and in the petition for a writ of error to the Supreme Court of Appeals of Virginia, the Appellant contended the evidence should have been struck because the statute creating the offense was constitutionally invalid. At all said points of procedure, the Appellant also contended Instruction No. 1 based on the statute was erroneous because of the invalidity of the statute (R. 17-19; R. 26-28). There could be no upholding of the conviction by either the trial court or by the Supreme Court of Appeals of Virginia without a square holding in favor of the validity of the statute alleged to be repugnant to the Constitution of the United States of America. (See Point 1 of the petition for a writ of error).

V. PRESENTATION OF FEDERAL QUESTION

Since the Appellant will go to jail if his conviction under the State statute is not reversed, the federal question involved is material to him. Because the statute is obviously constitutionally invalid for reasons hereinafter mentioned, the federal question is substantial.

Section 60 of the Virginia Constitution of Virginia prohibits lotteries. Being concerned or involved in numerous ways with a lottery is a misdemeanor in Virginia by virtue of a statute which provides:

"If any person:

(1) Set up, promote or be concerned in managing or drawing a lottery or raffle for money or other thing of value,

(2) Knowingly permit such lottery in any house under his control,

(3) Knowingly permit money or other property to be raffled for in such house, or to be won therein, by throwing or using dice, or by any other game of chance,

(4) Knowingly permit the sale in such house of any chance or ticket in, or share of a ticket in, a lottery, or any writing, certificate, bill, token or other device purporting or intended to guarantee or assure to any person, or entitle him to a prize or share of, or interest in a prize to be drawn in a lottery, or,

(5) For himself or another person buy, sell or transfer, to have in his possession for the purpose of sale or with intent to exchange, negotiate or transfer, or aid in selling, exchanging, negotiating or transferring, a chance or

ticket in or share of a ticket in a lottery, or any such writing, certificate, bill, token or device,

He shall be confined in jail not exceeding one year, and fined not exceeding five hundred dollars . . . " Va. Code §18.1 - 340.

This identical statute, without the numbering of paragraphs, was codified in the Va. Code of 1877 as ch. 194 §13, carried forward to the Code of 1887 as §3826 and the Code of 1919 as §4693; and with the paragraphs numbered, made part of the Code of 1950 as §18 - 301.

Since 1958, the operation of a "numbers racket" is apparently a felony in Virginia by virtue of an amendment to the aforesaid statute adding the following:

"; . . . provided that any person who shall violate any of the provisions of this section when such violation shall consist of the operation or conduct of a lottery commonly known as the numbers game or the numbers racket shall be confined in the penitentiary not less than one year nor more than ten years and fined not less than five hundred dollars, or in the discretion of the jury or the court trying the case without a jury, he shall be confined in jail not less than six months nor more than twelve months and fined not more than five hundred dollars, either or both." Acts 1958, ch. 377.

The statute as amended was re-enacted as Va. Code §18.1 - 340. Acts 1960, ch. 358. There is no reported judicial decision dealing with said 1958 felony amendment to the Virginia anti-lottery statute.

The offenses made misdemeanors by the statute are fairly clear and certain. A lottery is a form of gambling where a consideration is paid (or agreed to be paid) for

a chance to win a prize. *Maugks* v. *Porter,* 157 Va. 415, 161 S. E. 41 (1931). Sometimes it is difficult to decide when success depends on skill or on chance, but fairly reasonable standards of differentiation are available. See *Note: Contests of Skill and the Lottery Laws,* 23 Va. Law Rev. 431. The "numbers game" or "numbers racket" is clearly a lottery, *Hayden* v. *Commonwealth,* 203 Va. 398, 124 S. E. 2d 13 (1962); and thus the statute contains a standard as to what acts involving the "numbers game" are prohibited as misdemeanors.

On the other hand, the 1958 amendment contains no standard to ascertain when an act involving a lottery, otherwise prohibited as a misdemeanor, constitutes the "operation or conduct of a . . . numbers game". The statute does not define a "numbers game"; and while it may be clear that what some people call a numbers game is a lottery, it is not clear which lotteries are numbers games and which lotteries are not. Also the statute does not define "operation" or "conduct". Is the purchase of a chance called a "number" a misdemeanor or a felony? Is the sale of a "number" a misdemeanor or a felony? If not a felony, how far can a gambler go up the ladder in the numbers racket before he commits a felony instead of a misdemeanor? The statute contains no standards to distinguish what is felonious and leaves these questions unanswered.

During the course of the trial neither the judge nor the jury nor the prosecutor nor the defense counsel understood what was prohibited by the felony provision of the statute. To solve the problem the prosecutor called an expert witness to explain the crime with which the Appellant was charged, but the only evidence against the Appellant was that he threw on the floor two slips of paper

which could be interpreted as numbers slips but could also be interpreted otherwise (T. 50). The judge had to instruct the jury, without a statutory standard, about what was prohibited by the felony provision of the statute. The judge solved the problem by giving only one instruction on behalf of the Appellee (under which the jury had to return its verdict) following the language of the statute as follows (R. 20):

> "The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendant, Oliver W. Arnold, set up, promoted, or was concerned in managing a numbers game, you should find him guilty as charged and fix his punishment at confinement in jail not exceeding one year or a fine not exceeding five hundred dollars, either or both.
>
> "The Court further instructs the jury that if you believe from the evidence beyond a reasonable doubt that any such violation as set forth above consists of the operation or conduct of a lottery commonly known as the "numbers game" then you shall find the defendant guilty and fix his punishment by confinement in the penitentiary not less than one year nor more than ten years and a fine not less than five hundred dollars; or in the discretion of the jury by confinement in jail not less than six months nor more than twelve months and fined not more than five hundred dollars, either or both."

The first paragraph apparently defines a misdemeanor violation of Va. Code §18.1 - 340 (1), except it substitutes for the word "lottery" the words "numbers game". However, it does not tell the jury what is an illegal numbers game. Whether calling it a lottery or numbers game, the instruction should have defined the elements of consideration, chance and prize instead of

leaving the jury to decide what an illegal numbers game is.

The second paragraph apparently defines the felony violation. However it does not tell the jury how to distinguish between an ordinary lottery and a "lottery commonly known as the numbers game." Furthermore it does not define "operation" or "conduct", leaving the jury to decide not only what a numbers racket is but also what acts of "concern" with a numbers racket constitute the "operation" of a numbers racket.

"The proof of the pudding is in the eating" and the proof of the confusion of the instruction based on a vague statute is in the jury's own admission of confusion. The jury found the Appellant guilty "as charged" and fixed his punishment at confinement in jail for one year and a fine of $500.00. Immediately thereafter, the following statements were made in open court (T. 266-267; emphasis added) (Moran was the prosecutor; Kennett, the defense counsel):

> "MR. MORAN: If your Honor please, is it a misdemeanor or felony, I believe under the punishment it wouldn't — the punishment itself wouldn't determine that would it?
>
> THE COURT: Yes, that's a misdemeanor.
>
> MR. MORAN: A misdemeanor. Well if that's the judgment of the jury I just wanted to make sure.
>
> THE COURT: It's a misdemeanor punishment otherwise it would be in the penitentiary.
>
> MR. KENNETT: Well it's a question it could be in the alternate of the penalty.
>
> *THE JURY: The instructions were confusing to us.*

THE COURT: Well they were to us too. It is a very difficult statute to instruct under.

MR. MORAN: I believe under the felony he could be confined in jail twelve months.

THE COURT: Twelve months.

MR. MORAN: Felony also.

MR. KENNETT: Yes sir, that could be either one. I would like a clarification as to whether he was convicted under paragraph one or two?

THE COURT: Did you gentlemen mean to fine him under paragraph one or paragraph two?

THE JURY: We did not spell that out, we will have to go back in there.

THE COURT: It would sound like you found him guilty under paragraph one, but I'm not sure.

MR. KENNETT: I think under paragraph two that you could still have an alternative, instead of giving him penitentiary it could have been up to one year in jail and $500.00 fine.

THE COURT: Twelve months in jail.

MR. KENNETT: Yes sir.

THE COURT: I think the verdict is clear. It's under paragraph one because that's the only verdict you could give.

MR. MORAN: All right, I just wanted to know.

THE COURT: That's your verdict gentlemen?

THE JURY: Yes sir."

Rarely can a counsel arguing that a statute is vague and stardardless cite admissions by both the judge and jury in open court, as in this instance, that they do not understand what is prohibited by the statute. The due

process clause of the Fourteenth Amendment of the United States Constitution invalidates a state criminal statute which is so vague and standardless that it leaves the public uncertain as to what it prohibits or leaves the judges or jurors free to decide without any legally fixed standards, what is prohibited and what is not in each particular case. *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 86 S. Ct. 518, 15 L. 2d. 447 (1966).

VI. ALTERNATE REASONS FOR REVIEW BY CERTIORARI

In addition to the federal question for which the Court has jurisdiction on appeal, there are numerous federal questions involved in the case for which the Court might as a matter of sound judicial discretion review by writ of certiorari. Among these legal points are that the Appellant was denied due process of law because:

(1) He was convicted without sufficient evidence. The sole direct evidence against the Appellant was that he threw on the floor two ordinary slips of paper, 3 by 5 inches in size, with various numerals written on same (Commonwealth's exhibits 1 and 2). The numerals were not in his handwriting (T. 176), and may have been for some other use than for the numbers racket (T. 150). Even if he did have numbers slips in his possession, it does not prove he was operating a numbers racket. Conviction without evidence is a denial of due process. *Thompson* v. *Louisville*, 362 U. S. 199, 80 S. Ct. 624, 4 L. 2d 654, 80 A. L. R. 2d 1355 (1960).

(2) Appellant was not permitted to cross-examine the expert witness on matters dealing with that witness' direct testimony. The most damaging testimony against

the Appellant was given by an Investigator for the Virginia Department of State Police who had no direct knowledge of the case but who gave an expert opinion on how the numbers racket operated in the City of Roanoke based on his personal investigation. In effect, he told the jury by innuendo that the Appellant was guilty but he had no direct proof. On cross-examination, he admitted making periodic reports in narrative form to Department of State Police of his investigation of the numbers racket in the City of Roanoke (T. 140-142); but the trial court would not permit cross-examination of the investigator from these confidential reports (T. 144; T. 148). The situation is similar to the one in *Jencks* v. *United States,* 353 U. S. 657, 77 S. Ct. 1007, 1 L. 2d 1103 (1957). One of the most jealously guarded rights in the administration of justice is that of cross-examination of an adversary's witness. In criminal cases in Virginia, this right of the accused is preserved in the constitutional guarantee of confrontation, *Va. Const.* §8; as well as by the Federal due process clause. *Pointer* v. *Texas,* 380 U. S. 400, 85 S. Ct. 1065, 13 L. 2d 293, (1965).

(3) The basic evidence was obtained from the Appellant by false arrest. The record is clear that Appellant was not involved in the raid of Jackie's Shoe Shine Parlor as a liquor nuisance (T. 47; T. 54). Yet he was not permitted to leave the premises and thereby apparently was forced to throw the two slips of paper in question on the floor (T. 52; 101-103; T. 210). If the Appellant is honest in his denial of throwing the papers on the floor, he is innocent. If he did throw them on the floor, his action was coerced by false arrest. The due process law prohibits the use of evidence obtained illegally. *Map* v. *Ohio,* 367 U. S. 643, 81 S. Ct. 1684, 6 L. 2d 1081 (1961).

VII. ORDER APPEALED FROM

The order appealed from made and entered by the Supreme Court of Appeals of Virginia on October 5, 1966, is as follows:

> "The petition of Oliver W. Arnold for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Roanoke on the 13th day of January, 1966, in a prosecution by the Commonweath against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ or error and supersedeas, the effect of which is to affirm the judgment of the said Hustings Court."

VIII. CONCLUSION

For the reasons hereinabove stated, the Court should note jurisdiction and should issue a writ of appeal to the final order of the Supreme Court of Appeals of Virginia made and entered on October 5, 1966, confirming the conviction of the Appellant by judgment of the trial court on January 13, 1966.

Respectfully submitted,

OLIVER W. ARNOLD

By: John H. Kennett, Jr.
Of Counsel

John H. Kennett, Jr.
318-A Second Street, Southwest
Roanoke, Virginia
Counsel for Appellant

IX. PROOF OF SERVICE

I, John H. Kennett, Jr., counsel for the Appellant, and a member of the bar of the Supreme Court of the United States, do hereby certify that, on the first day of March, 1967, I served a true copy of the foregoing jurisdictional statement on the Appellee by mailing the same in a duly addressed envelope by first-class mail with postage thereon addressed to Robert Y. Button, Attorney General of Virginia, Supreme Court of Appeals Building, Richmond, Virginia, and to Leroy Moran, Attorney for the Commonwealth in and for the City of Roanoke, Municipal Building, Roanoke, Virginia.

JOHN H. KENNETT, JR.
Counsel for Appellant

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ARNOLD *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 1118. Decided April 24, 1967.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.